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No. 02-1441

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS PAPPAS,

Petitioner,

-against-

RUDOLPH GIULIANI, Mayor of the City of New York, HOWARD SAFIR, Commissioner of the Police Department of the City of New York, and THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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COUNTER-QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit properly held that a municipal police department may, without violating the First Amendment's guarantee of free speech, terminate a police officer by reason of the officer's anonymous dissemination of bigoted racist materials?

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COUNTER-STATEMENT OF THE CASE

Petitioner, a police officer formerly employed by the Police Department of the City of New York ("NYPD"), seeks to annul his termination on the basis that it was allegedly in retaliation for his exercise of protected speech

under the First Amendment. Respondents contend that petitioner's conduct does not implicate matters of public concern, but intends to express his own personal biases. Further, even if petitioner's actions could be characterized as speech implicating a matter of public concern, under the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the potential for disruption reasonably presented by petitioner's speech far outweighed any expressive value of the speech.

A. Background

On at least two occasions in 1996 and 1997, petitioner, then a New York City police officer, mailed racist anti-African and anti-Semitic written materials to the Mineola Auxiliary Police Department in a return envelope that had been mailed out as part of that voluntary organization's solicitation campaign (48, 299-304).[1] Petitioner had engaged in approximately 200 similar mailings over the years in response to solicitations from other organizations (54-55).

The written materials mailed by petitioner consisted of various articles which the Mineola Auxiliary Police Department considered offensive "hate mail," such as, *inter alia*, articles referring to African Americans as the "Negro Wolf" and depicting African Americans as "uneducated, spear-wielding savages" (50, 300, 303). Other articles referred to Jewish people as part of "the Kosher Food Racket," denied the existence of the Holocaust, and included the display of swastikas (50, 301).

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[1] Parenthetical references refer this Court to pages of the Joint Appendix, filed in the United States Court of Appeals for the Second Circuit, unless otherwise indicated.

The Nassau County Police Department investigated the source of these mailings by retaining the Honest Balloting Corporation, which traced the source of these offensive mailings to Petitioner (49). These mailings were ultimately referred to the Internal Affairs Bureau of the NYPD, which sent out its own solicitation mailings to petitioner's address, received defamatory articles from petitioner in return, and thereby confirmed that petitioner was the source of these mailings (50).

Petitioner admitted his participation in these mailing activities to the NYPD's Department Advocate's Office, and the NYPD subsequently issued against petitioner charges and specifications for his engaging in prohibited conduct regarding the dissemination of defamatory materials through the mails (48-49).

An administrative disciplinary trial was held on the disciplinary charges and specifications to determine what action, if any, the City would take with respect to petitioner's conduct (53). Petitioner testified at this trial and was cross-examined as to his reasons for mailing the materials (53-54). He indicated that the mailings were merely a form of protest resulting from his anger about being repeatedly solicited by charitable organizations; he testified that he hoped that his mailings would end the constant flow of solicitations by these organizations (53-54). He further stated that he did not intend to convey any particular message with regard to the contents of the articles sent in the mailings (53-54).

Petitioner explained that the motivation for his mailings were "just a hobby" and that he did not intend to offend, but acknowledged at the same time that some of the materials were inflammatory or defamatory towards persons of ethnic and other groups not his own (54, 55).

A 20-page decision, dated June 25, 1999, was rendered by the Assistant Deputy Commissioner of Trials, finding petitioner guilty of two Charges and Specifications regarding "Prohibited Conduct" and recommending petitioner's dismissal (47-67).

The Assistant Deputy Commissioner of Trials explicitly considered petitioner's First Amendment defense, but rejected it on the basis that (1) petitioner's conduct, by his own acknowledgement, did not constitute protected speech on a matter of public concern; and (2) even if it was protected speech, the potential for disruption in the NYPD outweighed any value of petitioner's "speech" (58). The Police Commissioner adopted the decision recommending Petitioner's termination on August 18, 1999 and petitioner was terminated from his employment (46).

Petitioner did not bring an Article 78 proceeding in state court seeking to challenge his termination within four months of the administrative trial judge's decision recommending termination or the Police Commissioner's ultimate determination to terminate his employment. Instead, petitioner brought the instant action in federal court by filing a complaint in January 2000, alleging that his termination from the NYPD constituted unlawful retaliation for protected speech under the First Amendment (363-69).

On or about May 19, 2000, respondents moved for summary judgment (41-304). On or about June 27, 2000, petitioner cross-moved for summary judgment (305-62).

B. The District Court's Order

By Opinion and Order dated October 25, 2000, the District Court (Buchwald, USDJ) granted respondents' motion for summary judgment, holding, *inter alia*, that

petitioner's conduct, to the degree it was expressive, did not bear on a matter of public concern, and, therefore, any disciplinary action taken on its account did not violate petitioner's constitutional First Amendment rights. *See* 118 F. Supp.2d 433 (S.D.N.Y. 2000).

Specifically, the District Court noted that petitioner intended to convey no message of "public concern" in his mailings to solicitors; "he simply wanted to dissuade charities from soliciting money from him by offending them with racist mailings." *Id.* at 445. The District Court further noted that "[i]n his initial interview with police investigators on March 24, 1998, petitioner suggested that his mailings were simply a 'hobby' with no purpose" and that "at his disciplinary hearing, he described his mailings as a form of 'protest' against 'being shaken down for money by the so-called charitable organizations,' and explained that he hoped the mailings would stop the organizations from soliciting him." *Id.* Thus, the District Court recognized that, "[b]y his own admission, [petitioner's] motive was to have his name removed from the mailing lists of solicitors." *Id.*

The District Court also explained that petitioner's choice of forum was relevant, even though speech need not be public to be protected as a matter of public concern:

> Mr. Pappas made no effort to forward his "protests" to the parties involved in the public debate and who represented the public interest, e.g., the Better Business Bureau, charitable oversight agencies, the IRS, the media, or the public at large. Rather, Mr. Pappas suggests that somehow, by anonymously sending his white supremacist literature to any charity with the

> misfortune of soliciting a donation from him, he was commenting on perennial matters of public concern such as taxation, political history, race and religion. This claim defies reason and the record. Although the First Amendment's protection does not turn on the effectiveness of a speaker's media strategy, Mr. Pappas' purported strategy for addressing a matter of public concern is so plainly unreasonable, it belies his claim that addressing matters of "public concern" was ever his intention.

Id. (citations omitted).

Assuming, *arguendo,* that petitioner could establish that his conduct amounted to speech of public concern, the District Court also held that the NYPD's interest in maintaining internal efficiency and collegiality outweighed any First Amendment protection to which petitioner's speech was entitled. Specifically, the District Court applied the *Pickering* balancing test to determine whether an employee's discharge for speech is constitutional. The District Court held, in pertinent part:

> On one side of the scale, we have [petitioner's] admittedly racist mailings. [petitioner's] racist tracts, sent randomly and anonymously to whichever organizations chanced to send him a mass-mailing solicitation, are at best entitled to a low level of First Amendment protection on the sliding Pickering scale. . . .
>
> On the other side of the scale, is the NYPD's concern about the potential disruption of having a known racist police

> officer on the force and in the media spotlight. The Supreme Court has long recognized that a police department has a substantial interest in developing "discipline, espirt de corps, and uniformity" within its ranks in order to fulfill its vital responsibility. . . . This substantial interest, in turn, gives police departments wide latitude in regulating the expressive activities of its officers in order 'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution'. . . .
>
> In the instant case, the police department had good reason to fear disruption in the force and the communities it served in reaction to [petitioner's] conduct. In view of the special latitude the Supreme Court has given police departments to discipline employees in light of the their essential mission, New York's recent problems with minority communities based on perceptions of police racism, the media coverage of [petitioner's] story, and the relatively low First Amendment value of [petitioner's] "public concern" speech, we find that there is no triable issue of fact concerning whether the potential for disruption outweighed the value of [petitioner's] speech.

Id. at 446-47 (citations omitted).

Further, the District Court noted that there was no evidence that the NYPD dismissed petitioner for the "content of his expression, as opposed to the potential for disruption in the aftermath of its discovery." *Id.* at 447. Specifically, the Court noted that the dismissal was based upon a careful application of the Patrol Guide and that there was a "'sufficient showing of both actual and potential disruption in the Department's working relationships among its own work force as well as its ability to function effectively in the multicultural environment of our city'" *Id.* at 448 (citing Commissioner Martinez' opinion at 13).

Thus, the District Court held that the NYPD's reasonable concern about the potential disruption arising from petitioner's conduct outweighed any First Amendment protection that conduct enjoyed, and, therefore, that respondents' dismissal of petitioner did not violate his First Amendment rights (39-40).

C. The Order of the Court of Appeals

On May 13, 2002, the United States Court of Appeals for the Second Circuit affirmed the District Court's order in a 2-1 decision. *See* 290 F.3d 143 (2d Cir. 2002). The Court held that, applying the *Pickering* balancing test, the police commissioner was entitled to terminate petitioner by reason of his public dissemination of his bigoted diatribes. Specifically, the Court concluded that petitioner was a public employee who disseminated his diatribes publicly, that he was venting his personal racial bias and that the making of such bigoted statements by a police officer had a very high capacity to impair the effective functioning of the NYPD in the discharge of its public mission and to provoke anger and discord among fellow police officers.

In explaining the *Pickering* balancing test, the Court of Appeals recognized that "[u]nder our Constitutional doctrines, few values are more carefully and thoroughly protected than the citizen's right to speak his mind on matters of public concern without interference by the government." *Id.* at 146. Nevertheless, the Court noted that this "right is not absolute" and that, "[a]t times, the right of free speech conflicts with other important government values, posing the problem of which interest should prevail." *Id.* The Court noted that the government employee's right of free speech is sometimes subordinated to the government employer's interest in its effective function. *Id.*

Applying the *Pickering* test, the Court held that:

> For a New York City police officer to disseminate leaflets that trumpet bigoted messages expressing hostility to Jews, ridiculing African Americans and attributing to them a criminal disposition to rape, robbery, and murder, tends to promote the view among New York's citizenry that those are the opinions of New York City police officers. The capacity of such statements to damage the effectiveness of the police department in the community is immense. Such statements also have a great capacity to cause harm within the ranks of the Police Department by promoting resentment, distrust and racial strife between fellow officers. In these circumstances, an individual police officer's right to express his personal opinions must yield to the public good. The restrictions of the First Amendment do not require the New York

> City Police Department to continue the employment of an officer whose dissemination of such racist messages so risks to harm the Department's performance of its mission.

Id. at 147.

The Court distinguished the instant case from *Rankin v. McPherson*, 483 US 378 (1987), relied upon by Judge Sotomayor in her dissenting opinion, by holding:

> This case is significantly different in several respects: (i) Pappas is a police officer, while the *Rankin* petitioner was a civilian clerical employee; (ii) Pappas disseminated his diatribes publicly while the *Rankin* petitioner was overheard speaking privately to a coworker; (iii) Pappas was venting his personal racial bias, while the *Rankin* petitioner (albeit in foolishly hyperbolic terms) was discussing the governmental policies of the President . . . (iv) furthermore, and most important, upon consideration of all the pertinent facts, while the *Rankin* petitioner's statement had little or no capacity to harm the effective functioning of the employer, the making of Pappas's statements by a police officer has a very high capacity to impair the effective functioning of the Police Department in the discharge of its public mission and to provoke anger and discord among fellow police officers.

Id. at 149 (citations omitted).

The Court rejected petitioner's argument that his statements had no capacity to impair the Department's effectiveness because he was assigned to computer work in the Management Systems Information Division rather than to law enforcement contact with the public, by holding:

> If Pappas were not a police officer but rather a civilian employee hired to work on the Department's computers, his case would have greater similarity to *Rankin*, and the capacity of his racist remarks to impair the Department's performance of its mission would be diminished. But Pappas is not a civilian employee. He is a cop. The fact that he was assigned to work on computers does not make him any less a cop, either in fact or in public perception. His assignment furthermore was subject to change; at any time he could have been assigned to a beat. If the press became aware of his dissemination of racist diatribes, it would report that this was done by a police officer – not that it was done by a person employed to work on Police Department computers. Furthermore, as to the capacity of Pappas's statements to cause racial tension and strife *among fellow police officers*, it would make no difference whether he was assigned to patrol a beat or to program computers.

Id. at 149-50.

The Court addressed Judge Sotomayor's reliance on this Court's holding in *Connick v. Myers*, 461 US 138 (1983), for the argument that petitioner's statements were made from his home, on his own time, and anonymously, in a manner that did not reveal that he was a police officer:

> To say that his statements would have had greater likelihood of causing harm if made in uniform or at work does not mean that they did not have a substantial capacity to cause harm as they were made. Where and when the statements are made is certainly a factor to be considered in the overall assessment, but it is only a factor. No talismanic or determinative significance attaches to it. What we must do in such cases is assess the entire picture – especially the likelihood that the employee's speech will harm the functioning of the governmental employer. Given the nature of Pappas's statements and their very high capacity to inflict serious harm on the employer's mission if it were discovered that they came from a police officer, the fact that Pappas acted anonymously, at home, and on his own time does not alter the ultimate conclusion that the Department was entitled to dismiss him because of the harm to the Department that his statements risked to inflict.

Finally, the Court addressed Judge Sotomayor's point that the NYPD should not have terminated petitioner because, absent its decision to discipline petitioner, no one would have known that these offensive materials were being distributed by a police officer. *Id.* at 150-51. In rejecting this argument as "seriously misguided as a policy matter" and "premised on a misunderstanding of the law," the Court held:

> First, as to the policy implications, we have little sympathy for the suggestion that the proper course for the Police Department,

upon learning that one of its officers was disseminating offensive racially bigoted materials, was to hush the matter up and hope to keep it secret. Had the Department taken this course and the truth had eventually become known, the harm to the Department would have been all the greater because the Department would have been perceived as tolerating Pappas's acts and being in passive complicity. While it may be true that the Department could have avoided adverse publicity had it covered up Pappas' misconduct rather than proceeding against him, that does not make it the right thing to do, and the Department did not lose the right, as Judge Sotomayor suggests, to dismiss Pappas for the misconduct merely because the bringing of the disciplinary action brought to public light the fact that it was a police officer who was responsible for the hate mailings.

Judge Sotomayor's argument is also premised on a misunderstanding of the government's burden under *Pickering*. A governmental employer's right to discharge an employee by reason of his speech in matters of public importance does not depend on the employer's having suffered *actual* harm resulting from the speech. The employee's speech must be of such nature that the government employee reasonably believes that it is likely to interfere with the performance of the employer's mission. The employer's interest in discharging the employee is demonstrated if the employee's

> statements create a significant risk of harm, regardless whether that harm actually materializes.

Id. at 151.

Accordingly, the Court, in balancing petitioner's interest in the right to pronounce his views against the NYPD's interest in promoting the efficiency of the public service it performs, concluded that the NYPD was entitled to terminate petitioner by reason of his public dissemination of his diatribes. *Id.* at 151.

Judge McMahon concurred, but wrote separately and agreed with the District Court that petitioner was engaged in "purely private speech." *Id.* at 152. Judge McMahon reasoned that the Court should focus on whether petitioner's speech was "calculated to redress personal grievances or whether it had a broader public purpose." *Id.* at 153. Judge McMahon concluded, in pertinent part, that petitioner was admittedly engaged in purely personal speech, even though the words he spoke touched upon matters of public importance, since at his departmental trial petitioner stated that his sole goal for disseminating his diatribes was to get his name excised from direct mail solicitation lists. *Id.* at 154.

In her dissenting opinion, Judge Sotomayor, although recognizing the substantial deference given to government employers in the law enforcement context, found, in pertinent part, that summary judgment was inappropriate because the majority set forth "too broad a rule regarding the government's ability to disqualify an individual from public employment based on the expression of an unpopular viewpoint." *Id.* at 158.

In an order dated November 13, 2002, the Court of Appeals denied petitioner's motion for a rehearing (A57-58).

REASONS FOR DENYING THE PETITION

Contrary to petitioner's contentions, the Court of Appeals' decision does not present novel and/or unresolved questions regarding governmental employees' First Amendment rights, nor does the decision present a conflict between the Second Circuit and the Fourth and Tenth Circuits. Rather, as shown below, the decision is based upon long-standing United States Supreme Court and Second Circuit precedent.

A. Matter of Public Concern

Petitioner attempts to "spin" the mailings he sent to various nonprofit organizations as constitutionally protected speech on matters of public concern based on the very contents of the mailings, whereas at his administrative trial he acknowledged that his mailings were merely a form of personal protest for receiving unwanted solicitations for donations, irrespective of the contents of what he included in his mailings and without any intent to convey a message by the contents of the mailings (53-55). Even if a recipient of petitioner's mailings could possibly have understood the message petitioner claims to have attempted to convey, such mailings, even if they were speech, do not amount to speech relating to a matter of public concern. *Connick v. Myers*, 461 U.S. 138 (1983); *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1995); *see also Pruitt v. Howard County Sheriff's Department*, 623 A.2d 696 (Md. Ct. Spec. App.), *cert. denied*, 630 A.2d 723 (1993).

In *Pruitt*, police officers engaged in a parody of the television program "Hogan's Heroes" by "uttering German

words and phrases, clicking their heels together, and raising their arms in Nazi-like salutes." The Maryland court concluded that the speech was private because it "did not contain any allegations of wrongdoing or present issues of public concern to the community." 623 A.2d at 701-702. As was the case in *Tindle*, the court in *Pruitt* found that the conduct at issue was unprotected because it did not address "a matter of public interest but instead indicated a personal bias." *Id.* The speech here is likewise a mere airing of bias, equally vacuous and equally unprotected. *See also Lawrenz v. James*, 852 F. Supp. 986, 991-92 (M.D. Fla. 1994), *aff'd*, 46 F.3d 70 (11th Cir. 1995) (upholding termination of prison guards wearing "White Power" t-shirts at an off-duty barbecue with other officers). The contents of petitioner's mailings here are clearly nothing more than expressions of petitioner's personal biases and of no concern to the community.

By petitioner's own testimony at his administrative trial, he had no intention of conveying any message to the general public by his mailings to organizations sending him solicitations; he merely sought to have these organizations stop sending him mailings as a matter of purely personal private interest (177-79, 184-85, 219-20, 222, 227, 229).[2] He also stated that he did not intend to start any trouble or

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[2] For example, petitioner has never indicated that he sought to publish the contents of his mailings or make it known to the public that he was sending mailings as a form of protest to the receipt of solicitations. The point of the so-called speech in question was not to convey a message to the public. *See Kokkinis v. Ivkovich*, 185 F.3d 840 (7th Cir. 1999) (stating that it is necessary to evaluate point of the speech in question to determine whether it constitutes a matter of public concern).

offend anyone by the contents of his own mailings (184, 229). Petitioner's personal annoyance with what he considers junk mail in his mailbox simply does not constitute a matter of public concern.

Accordingly, Judge McMahon correctly found that petitioner did not intend to speak on matters of public concern. Indeed, petitioner himself stated at his administrative trial that these mailings were part of "just a hobby" (55). As noted by Judge McMahon: "His own mouth condemneth him." 290 F.3d at 154. Thus, petitioner's First Amendment claim fails for this reason.

B. Application of the *Pickering* Balancing Test

Under *Waters v. Churchill*, 511 U.S. 661 (1994), a balancing test originally enunciated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), is used to determine whether the First Amendment protects expression by a government employee from discipline by the employer. This Court stated in *Waters* (511 U.S. at 668):

> There is no dispute in this case about when speech by a government employee is protected by the First Amendment: To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick, supra*, 461 U.S. at 142 (quoting *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968)). It is also agreed that it is the court's task to apply the

Connick test to the facts. *461 U.S. at 148, n. 7, and 150, n. 10.*

In restricting speech by its employees, the government as employer has far broader powers than does the government as sovereign. *Waters*, 511 U.S. at 671-72. "The First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' as 'necessary side effects of . . . the process of open debate,' *Cohen v. California*, 403 U.S. 15, 24-25 (1971). But we have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work." *Waters, supra*, 511 U.S. at 672. This Court further stated (511 U.S. at 673):

> We have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. . . . But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.

Summarizing the balancing test, this Court stated (511 U.S. at 675):

> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

As the Second Circuit Court of Appeals recently noted, in balancing the interests of the employer in providing effective and efficient public services with the public employee's interest in commenting on matters of public concern,

> a court must consider whether the statement sought to be protected impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships . . . or interferes with the regular operation of the enterprise.

Moskowitz v. Coscette, __ F.3d __ (2d Cir.), 2001 U.S. App. LEXIS 813 (citing *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir.), *cert. denied*, 528 U.S. 823 (1999)).

Petitioner herein has not properly applied the *Pickering* test. It is well established that the expressive value of the speech must be weighed against the government employer's reasonable belief in the *potential* for disruption, and that the government need not prove any

evidence of actual disruption. *See Waters, supra*; *Heil v. Santoro*, 147 F.3d 103 (2d Cir. 1998).[3]

On petitioner's side of the balancing scale, the First Amendment value of petitioner's speech is quite low. As the court in *Tindle* suggested, the lack of an intent on the part of the actor to communicate a message at the very least lessens the expressive attributes of the action. As the complaint in this case contains no hint of any message that petitioner intended to convey by his mailings, any inherently expressive content in petitioner's conduct is thoroughly diluted. *Tindle*, 56 F.3d at 970. The conduct involved in this case, *i.e.*, sending inflammatory hate mail to various groups, at best stands at the outer edge of the First Amendment's protections as low value speech, and is at the periphery of the "public concern" doctrine. Accordingly, under the *Pickering* and *Waters* balancing test, the protectible interest of this public safety employee in making the speech is minimal at best.

With respect to the Police Department, "on the other side of the scale is the likelihood of disruption to

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[3] The continuing viability of *Rankin v. McPherson*, 483 U.S. 378 (1987), which was decided by a slim majority of this Court, may be in some doubt following the subsequent decision in *Waters*. In any event, *Rankin* is distinguishable for a number of reasons discussed in the Court of Appeals' decision herein because in *Rankin* this Court found that a single, off-the-cuff remark to the petitioner's co-worker boyfriend could not be sufficiently disruptive to outweigh the employee's interest in the expressive value of the speech. Here, of course, petitioner engaged in a repeated pattern of controversial mailings that generated a criminal investigation and was newsworthy to the local media.

police operations and the protection of the strong interest police departments have in developing discipline, esprit de corps, and uniformity within its ranks so as to insure the safety of persons and property." *Heil v. Santoro*, 147 F.3d at 109; *Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

Discipline of public safety employees for off-duty expression of racist or ethnic hate messages has been sustained when there was a reasonable potential for disruption of the agency's work due to either or both internal dissension and damage to public perception of the agency's fairness in carrying out its duties. *See Weicherding v. Reigel*, 160 F.3d 1139 (7th Cir. 1998) (public participation in a Ku Klux Klan rally warranted termination of a prison guard. It could impair the perception of fairness by prison administrators in a racially charged environment where it was important to avoid racially motivated violence; guard posed a danger to the staff and he himself was at risk); *Tindle v. Caudell, supra*, 56 F.3d 966 (a police officer went to a Halloween party at a police lodge dressed in blackface, wearing bib overalls and a black, curly wig, and carrying a watermelon. A 30-day suspension for the officer was sustained against First Amendment challenge. The party had been attended by other officers and their guests, several African-American members of the police force were offended by the petitioner's appearance at the party, and the department already was concerned about racial divisions within the force and had undertaken programs to remedy the problem. The Court held that this appearance at a private party did not implicate a matter of public concern. However, even if it did, the *Pickering* balance weighed heavily in favor of the police, given the need to maintain harmony in this paramilitary organization charged with maintaining public safety and order, which thereby is given more latitude in

their decisions regarding discipline than an ordinary government employer); *Lawrenz v. James*, 852 F. Supp. 986 (M.D. Fla 1994), *aff'd*, 46 F.3d 70 (11th Cir. 1995) (petitioner, a correction officer, wore a "White Power" T-shirt adorned with a swastika at a barbecue to which the police were eventually called due to someone firing a rifle. Petitioner told the police he was wearing the "White Power" T-shirt to commemorate Martin Luther King Day. This incident received local press coverage. Petitioner's termination from employment was upheld. The wearing of the T-shirt by petitioner and the discussion of his views on race relations did not involve a matter of public concern, but even if it did, the *Pickering* balance tilted strongly in favor of the Department, given the potentially adverse reaction that may arise from employment of a correction officer with such views. The Department did not have to wait until racial tensions actually erupted before taking action).

Here, the Second Circuit properly found that the interest of the City in preventing both internal and external disruption is extraordinarily weighty. *See* 290 F.3d at 146-48. As an employer, the NYPD is entitled to maintain discipline, instill public confidence in public safety agencies, and ensure harmony as necessary to the operation and mission of its agency. *See Gilbert v. Homar*, 520 U.S. 924, 932 (1997). The potential for disruption is extensive here, as any toleration of petitioner's defamatory conduct would undermine public confidence in the NYPD.

The very fact that the media found petitioner's conduct newsworthy indicates that some disruption has already occurred. In *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985), a clerical employee in a law enforcement office was terminated after his membership in the Ku Klux Klan was brought to the public's attention via the media.

The employee's First Amendment retaliation claim was dismissed in that case because of the potential for disruption in the law enforcement context. Here, too, a police officer performing primarily non-law enforcement duties has engaged in conduct that brings discredit and disruption on a law enforcement agency. The instant case is virtually indistinguishable from *McMullen*.

Moreover, in light of all of the media attention devoted to the NYPD's contacts with the minority community, it is incredible to believe that the NYPD's belief in a potential for disruption is unreasonable when one of its own officers expresses overtly racist views, whether symbolically through racist and anti-Semitic mailings or through his own utterances. Petitioner can only state in a conclusory way that no disruption occurred, but courts have repeatedly recognized that where the very potential for disruption is apparent from the employee's speech itself, a municipality need not continue to employ that individual. *See Lewis v. Cowen*, 165 F.3d at 165 ("This is the classic case of an employee 'who is paid a salary so that he will contribute to an agency's effective operation but who begins to do or say things that detract from the agency's effective operation.'" [citing *Waters v. Churchill*, 511 U.S. at 675]); *Lumpkin v. Brown*, 109 F.3d 1498, 1500-01 (9th Cir.), *cert. denied*, 522 U.S. 995 (1997) (removal of San Francisco City Commissioner of Human Rights for speeches condemning homosexuality did not violate the First Amendment; "the City has not only a legitimate but a heightened expectation that its Human Rights Commissioners refrain from speaking in a way that mocks the City's anti-discrimination policy"); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237 (11th Cir. 1992) (black male employee of Miami Department of Community Affairs properly disciplined for anti-Hispanic statements; the "First Amendment does not require that

[petitioner] be allowed to continue his weekday employment drenching the fires of racial animosity for the Department while he fans those flames during his weekend sermons").

As set forth below, there has even been civil unrest due to a lack of confidence by some members of the polity in the NYPD. That indispensable trust between the police and polity, which has already been in substantial tension, has been imperiled by petitioner's actions. The millions of dollars and the mandatory nature of the CPR program, as well as its wide publicity (for example, the words "Courtesy, Professionalism and Respect" have been painted on many police cars as a constant reminder to both police and public), show that this concern is not a post-hoc rationalization in the case at bar. Policing is also a cooperative effort between police officers. Those cooperative bonds have been damaged by petitioner's defamatory actions. *See Tindle*, 56 F.3d at 971; *Crain v. Board of Police Commissioners*, 920 F.2d 1402, 1409 (8th Cir. 1990).

This City has had repeated public disturbances protesting alleged police misconduct. From Howard Beach Queens, to Crown Heights, Brooklyn, to Washington Heights, Manhattan, police conduct has been under the most intense scrutiny and, unfortunately, some members of the public are all too ready to believe the worst of their police. The potential for such disturbances is intensified by the acts of this petitioner. Another source of disruption stemming from this incident is that petitioner's motives will now be suspect in any questionable exchange between him and a member of a minority group, whether with fellow employees at work or those in the general public in the

community.[4] The City cannot repose trust in petitioner's reliability and judgment after he has so conspicuously displayed such a lack of judgment.

It need only be added that numerous federal courts have recognized in the context of § 1983 First Amendment litigation that "deference to the employer's judgment regarding the disruptive nature of an employee's speech is especially important in the context of law enforcement." *Kokkinis*, 185 F.3d at 845; *Tindle, supra*. Morale and confidence in the NYPD is simply not served by the retention of employees who engage in conduct like petitioner's.

Accordingly, the Second Circuit's analysis of the *Pickering* balancing scale falls decisively in favor of respondents.

C. There is No Split Between the Second Circuit and the Fourth and Tenth Circuits.

Contrary to petitioner's assertions, there is no conflict between the Second Circuit's decision herein and the Fourth Circuit's decision in *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985), and the Tenth Circuit's decision in *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989), because crucial factual differences exist which render the Fourth and Tenth Circuit decisions readily distinguishable.

At the outset, it is important to emphasize that, as discussed supra, pp. 15-17, petitioner's anonymous dissemination of offensive mailings had the sole goal of

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[4] In fact, petitioner was once reprimanded for insensitive remarks towards an African-American employee in the Department (55).

getting his name excised from direct mail solicitation lists. As Judge McMahon noted, petitioner was admittedly engaged in pure personal speech, which he so stated at his disciplinary hearing when it mattered most: "His own mouth condemneth him." 290 F.3d at 154.

To the contrary, the *Berger* plaintiff's Al Jolson impersonation act constituted speech upon a matter of obvious public interest to those segments of the community who willingly attended them and sometimes paid to see plaintiff's act. *Berger*, 779 F.2d at 999. Moreover, the *Flanagan* court found that the plaintiffs' rental of sexually explicit videos from their video rental store constituted "protected expression." *Flanagan,* 890 F.2d at 1565.

Moreover, the application of the *Pickering* balancing test presents significant distinctions between the instant case and the *Berger* and *Flanagan* decisions. In *Berger*, plaintiff, who performed in blackface and entertained hundreds of people, including members of the Police Department, was referred to by the Deputy Commissioner as "the Department's Al Jolson." 779 F.2d at 994. The Department was aware of plaintiff's musical act, including his Al Jolson impersonation, for at least 4 years before plaintiff's act became the source of public disruption as a result of the NAACP's public protest to his act. *Id.* at 994-96. The Department conceded that there had not been any disruption or potential disruption of the Department's internal operations as a result of plaintiff's performances in blackface. *Id.* at 996.

The Fourth Circuit held that plaintiff's conduct in performing public entertainment in blackface was constitutionally protected speech in that it outweighed the Police Department's countervailing interest in avoiding future disruptions both of its resources and harmonious

relationships with the black community. *Id.* at 1002. The Circuit specifically held that "the perceived threat of disruption *only to external operations and relationships*" was "caused not by the speech itself but by the threatened reaction to it by offended segments of the public." *Id.* at 1001 (emphasis added).

Similarly, the Tenth Circuit in *Flanagan* noted that the police department did not argue that plaintiffs' speech had any detrimental impact on working relationships within the department or interfered with its regular operation. 890 F.2d at 1566. As in *Berger,* the Court noted that the defendants' concern involved the reaction by offended members of the public and its adverse impact on external relationships and operations. *Id.*

The Second Circuit's decision herein is not a threat to the First Amendment in the form of a "heckler's veto," as the courts found in *Berger* and *Flanagan.* 779 F.2d at 1001, 890 F.2d at 1566. To the contrary, the NYPD's concern involved to a large extent the potential internal disruption of having a known racist police officer on the force and in the media spotlight. Indeed, the Second Circuit recognized that petitioner's statements had a "great capacity to cause harm within the ranks of the Police Department by promoting resentment, distrust and racial strife between fellow officers." 290 F.3d at 147. The NYPD's concern is consistent with this Court's recognition of a police department's substantial interest in developing "discipline, esprit de corps, and uniformity" within its ranks in order to fulfill its vital public mission. *Kelley v. Johnson,* 425 U.S. 238, 246 (1976). Therefore, the Second Circuit properly concluded that the NYPD had good reason to fear disruption in the force and the communities it serves in reaction to petitioner's conduct.

Accordingly, it is clear that there is no conflict between the Second Circuit's decision herein and those of the Fourth and Tenth Circuits. Absent any conflict and for the additional reasons presented above, the City respectfully requests that this Court deny the petition for a writ of certiorari.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to deny the petition for a writ of certiorari.

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